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Executive Order Limits Use of Subregulatory Guidance. The President issued an Executive Order focused on agency use of subregulatory guidance to set policy. Under the Executive Order, agencies would need to review previously-issued subregulatory guidance and determine whether it should still be effective. If so, it needs to be added to a searchable, online database of such guidance. The Executive Order also contains a number of procedural hurdles for certain types of guidance issued in the future. It appears that guidance such as Wage & Hour Division opinion letters — which have been revitalized in the current Administration — are excluded from the most onerous requirements.

Second Executive Order Further Limits Use of Guidance. In a second Executive Order issued yesterday, the President required administrative adjudication to be based on statutory or regulatory violations. Conduct that would only "violate" a subregulatory standard may not be treated as a violation. Subregulatory guidance can only serve to articulate the agency's understanding of how a statute or regulation applies to particular circumstances. The Executive Order would also require investigative agencies to provide written responses to challenges to their proposed legal and factual findings.

WHD Releases Tip Pool Proposal. This week, the Department of Labor's Wage & Hour Division released an eagerly-awaited proposal to update the regulations on tip pooling. The proposed rule would allow back-of-the-house employees to participate in tip pools in limited circumstances and would formalize WHD's rejection of what had been known as the 80/20 rule (which limited the amount of time an employee could spend on non-tip-producing tasks). The comment period runs for 60 days. For more, see Seyfarth's Wage and Hour Litigation Blog.

Waiting in the Wings? As we await House consideration of the Protecting Older Workers from Discrimination Act (H.R. 1230, S.485), approved by the House Education and Labor Committee on June 11, and the PRO Act (H.R. 2474, S.1306), approved by the Committee on September 25, it's worth keeping an eye on the Pregnant Workers Fairness Act (H.R. 2694). Deceptively simple, it would require, among other things, employers to make reasonable accommodations to the "known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would pose an undue hardship on the operation of the business of such covered entity." While similar to the ADA in some respects, the limitations covered are apparently different and hence the level of accommodations required may, in practical terms, differ. Stay tuned for future analysis and developments.

LGBTQ Coverage under Title VII. On Tuesday the US Supreme Court heard arguments over the meaning of "sex" under Title VII of the 1964 Civil Rights Act and whether it prohibits discrimination based on sexual orientation and or transgender status, arising in the context of three cases. While we won't predict which way the Court will go, it's worth noting that an adverse decision would add impetus to passage of the Equality Act (H.R. 5), which passed the House on May 17, or perhaps even open the door to reconsideration of its slimmed-down version applying to employment, the Employment Non-Discrimination Act (ENDA) from past Congresses. We don't expect a decision by the Court until March or April.

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